



November 7, 2022

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**RE: DRBC October 17, 2022 Communication to EPA regarding DRBC
Rulemaking Petition to Revise the Designated Uses and Dissolved Oxygen Criteria
for Three Zones of the Delaware Estuary**

Dear Mr. Reagan and Ms. McCabe:

We reach out with reactions to the Delaware River Basin Commission's (DRBC's) October 17, 2022 letter sent to the U.S. Environmental Protection Agency (EPA) in response to the April 29, 2022 Petition submitted by the Delaware Riverkeeper Network, PennFuture, Clean Air Council, Environment New Jersey and PennEnvironment urging the EPA to promptly initiate rulemaking necessary to protect aquatic life in the Delaware Estuary, including the federally endangered Atlantic sturgeon that are on the brink of extinction. Rather than quell the concerns that led to submission of the Petition, DRBC's October 17, 2022 letter has instead confirmed the necessity for EPA leadership and action to secure water quality standards essential for protecting aquatic life, and the federally endangered Atlantic sturgeon. DRBC's letter represents a doubling down on the mischaracterization, inappropriate use, and misinformation regarding critical scientific studies and their conclusions regarding the water quality, dissolved oxygen needs of the Atlantic sturgeon, and population status of the sturgeon.

We believe that our Petition contains accurate analyses and information and continues to provide a more-than-adequate justification for EPA to take action under section 303(c)(4)(B) of the Clean Water Act. However, in light of DRBC's most recent communication, we felt it was important to emphasize a few key points regarding water quality standards and appropriate development of criteria.

I. Propagation is an Existing Use for the Tidal Delaware River; Therefore, The Designated Use Must Be Upgraded

The Clean Water Act prohibits the degradation of existing uses. Specifically, “where existing water quality standards specify designated uses less than those which are currently being attained, the State *shall* revise its standards to reflect the uses actually being attained.”¹ The “existing use” for the entire tidal Delaware River (covering Zones 3, 4, and 5, collectively, the “subject zones”) includes “propagation” of fish and other aquatic life, a reality acknowledged in DRBC’s 2015 analysis of key estuarine fish species² and demonstrated through the data and scientific studies presented in our 2013 and 2021 petitions to DRBC seeking upgrades protective of this use.³ DRBC’s current modeling of conventional upgrades (*i.e.*, nitrification) for nine municipal wastewater facilities confirms both that “propagation” is the appropriate designated use (in addition to being the existing use) and that substantial further improvements to the dissolved oxygen regime of the tidal Delaware River are possible and long-overdue.⁴ There is no controversy about the existing use, or attainability, of “propagation” for the entire Delaware River, including those zones of the tidal river that have failed since 1972 to comply with the basic section 101(a)(2) uses of the Clean Water Act.

The plain language of the Clean Water Act and the wealth of scientific study and data demonstrating fish propagation in all estuary zones confirm the legal mandate to recognize and protect this use. The DRBC’s letter and public process demonstrate an intent to pursue an alternate

¹ 40 C.F.R. § 131.10(i) (emphasis added).

² DELAWARE RIVER BASIN COMM’N, EXISTING USE EVALUATION FOR ZONES 3, 4, & 5 OF THE DELAWARE ESTUARY BASED ON SPAWNING AND REARING OF RESIDENT AND ANADROMOUS FISHES 3 (Sept. 30, 2015), https://www.state.nj.us/drbc/library/documents/ExistingUseRpt_zones3-5_sept2015.pdf.

³ Delaware Riverkeeper Network et al., *Petition by the Delaware Riverkeeper Network, the Delaware Riverkeeper, the Delaware River Shad Fishermen’s Association and the Lehigh River Stocking Association to DRBC* (Mar. 14, 2013), https://www.nj.gov/drbc/library/documents/WQAC/053113/handout3_DRN-DRSFA-LRSA_petition.pdf; Delaware Riverkeeper Network et al., *Delaware River Fish Protection Petition to DRBC* (Mar. 3, 2021).

⁴ DRBC, *Draft Analysis of Attainability: Improving Dissolved Oxygen and Aquatic Life Uses in the Delaware River Estuary* (Sept. 30, 2022), available at https://www.nj.gov/drbc/about/advisory/WQAC_index.html#2.

path than the one set out in the Clean Water Act and its regulations, confirming that it is essential that EPA step in and act.

II. The Clean Water Act Does Not Contemplate “Attainability” as a Factor in Setting Water Quality Criteria

With a full decade of repeated acknowledgement that “propagation” is both the existing use and the appropriate designated use for the subject zones, the only remaining question is what scientifically-defensible water quality criteria will meet the needs of the aquatic life for dissolved oxygen and other key water quality parameters. Petitioners are confident that EPA understands that this is a straightforward process where the scientific literature is used to determine the water quality conditions that support the designated uses and, from there, criteria is set that will achieve those water quality conditions.

Rather than follow this clear, scientifically driven, legal mandate, DRBC repeatedly fails in its responsibility to write appropriate criteria for the Basin States by instead approaching the water quality standards question from the bottom-up, seeking to determine and define new dissolved oxygen criteria based on what “reasonable” water quality improvements can be secured as the result of changes to discharger operations, rather than based on the scientifically determined conditions necessary to protect the existing use of fish propagation. In other words, the new dissolved oxygen criteria will be defined by the improved dissolved oxygen conditions DRBC’s model demonstrates can result from changed operations the dischargers determine are reasonable and feasible; the criteria will not be based on the scientifically determined water quality conditions needed for supporting fish propagation.

While revising the designated use of “propagation” would necessarily require attendant supporting criteria, DRBC has inverted the process the Clean Water Act contemplates for establishing water quality standards. DRBC has asked the regulated community, “what can be done to improve dissolved oxygen levels in the tidal Delaware River?,” when the threshold question is what the scientific literature indicates is required to fully support the propagation and maintenance of fish and aquatic life. DRBC’s backwards-looking approach centers the regulated community’s answer to the aforementioned question over the needs of the invaluable fish and aquatic life of the tidal Delaware River. DRBC’s changed interpretation and application of the Clean Water Act overturns decades of agency and judicial interpretation and application and in so doing sets a new precedent with far-reaching ramifications.

The precedent that will be set by following DRBC’s proposed interpretation and application of the law is incredibly dangerous for our Delaware River and water resources nationwide. If DRBC were allowed to continue on its current path, EPA would be complicit in allowing DRBC to establish water quality criteria based *not* on the needs of the aquatic life in our rivers, streams, and

estuaries, but based on current understandings of reasonable technologies and appetite for upgrades. We reaffirm that, in exercising its Section 303(c)(4)(B) authority, EPA should incorporate the proposed criteria set forth in our April 29, 2022 Petition and supported by scientifically-defensible methods. To the extent that DRBC is concerned about subsequent contestation of a promulgated water quality criteria that does *not* factor in attainability from the outset.⁵ This concern is misplaced—the appropriate basis for water quality criteria is not attainability, but rather “sound scientific rationale” to protect the use.⁶ In addition, a public notice and comment period for any revised water quality standard would provide the appropriate forum in which concerned stakeholders would address any alleged flaws with the scientific bases for the proposed criteria.

In 1967, when DRBC established the dissolved oxygen criteria and the CBOD wasteload allocations that still remain in effect today, the modern Clean Water Act had not yet been enacted. DRBC’s approach toward bottom-up criteria and a “least cost” compromise was both pragmatic and arguably legally defensible in the 1960s.⁷ In 2022, however, DRBC has returned to its old playbook and has reaffirmed its approach toward industry-friendly pragmatism, defending its decades-long bottom-up approach when “propagation” had already been established as an existing use by 2013, and multiple expedient pathways could have led to tangible restoration beginning as early as 2010. It is not surprising that DRBC’s lengthy defense of its “analysis first” approach⁸ cites neither the Clean Water Act nor the Code of Federal Regulations. The Clean Water Act and its more protective approach to aquatic life protection and water quality criteria now supersedes DRBC’s less protective approach. That being said, DRBC’s approach has no basis in the Clean Water Act; it is indefensible under the law; and it cannot be allowed to rewrite 50 years of Clean Water Act protection in undermining and harmful ways.

Indeed, DRBC’s appeal to EPA essentially amounts to an appeal for allowing DRBC to use an outdated, politically-influenced process for setting the estuary’s uses and criteria rather than complying with the Clean Water Act. This appeal for further compromise, further influence from powerful and well-funded interests, and unnecessarily-prolonged timelines sacrifices our estuary, our endangered species, and the societal benefits of clean water. It is valuable to recall the promises from the DRBC’s Use Attainability Study in the 1980s; a bottom-up capitulation to industry for building a model before any upgrades led to another 30 years of pollution and hypoxia, including continued declines for the Atlantic sturgeon whose population now hangs by a thread.

⁵ DRBC Letter Response to EPA, at 8 (Oct. 17, 2022).

⁶ 40 C.F.R. § 131.11(a)(1).

⁷ Wright, J.F. and R. Porges. 1971. Water quality planning and management experiences of the Delaware River Basin Commission. Proceedings of the 5th International Water Pollution Research Conference; Pergamon Press Ltd; pgs. I-3/1 to I-3/17.

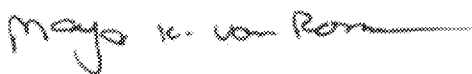
⁸ DRBC Letter Response to EPA, at 7–8 (Oct. 17, 2022).

Importantly, EPA must revise water quality standards under Section 303(c)(4)(B) of the Clean Water Act when it finds that a state has failed to meet the requirements of the Clean Water Act.⁹ This authority reflects the principles of cooperative federalism that underpin the statute. Since at least 2010, DRBC and the Estuary States of Pennsylvania, New Jersey and Delaware, have neglected to revise the water quality standards for the subject zones in a manner consonant with the Clean Water Act. Accordingly, EPA must now step in and promptly initiate rulemaking to revise the water quality standards for the subject zones.

III. Conclusion

For all the reasons outlined above, as well the further analysis provided in our Petition, s, EPA should immediately recognize the intrinsic flaw in DRBC's proposed water quality criteria-setting approach as it both warps the process contemplated by the Clean Water Act and permits DRBC to continually postpone revising the existing use of "propagation" within the subject zones. Petitioners reaffirm the arguments within our April 29, 2022 Petition: because DRBC has neglected to fulfill its role as the authority to establish water quality standards under the Clean Water Act, and because the estuary states have failed to take direct action, EPA must intervene and federally promulgate water quality standards for the tidal Delaware River that are in compliance with the Clean Water Act and its regulations.

We, the Petitioners, also intend to supplement our response to EPA with additional submissions in November 2022 following consultation with technical experts in the field.



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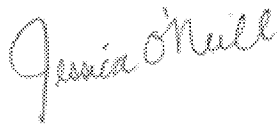
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⁹ *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1091 (E.D. Pa. 1996) (“[T]he EPA may publish a revised water quality standard for a state when ‘the Administrator determines that a revised or new standard is necessary to meet the requirements’ of the Act.”)(citing § 1313(c)(4)(B)); *Am. Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993)(explaining that EPA’s authority to promulgate new water quality standards is limited to two circumstances, and one of those circumstances arises when a state has not promulgated a new or revised standards, but a new or updated standard is necessary to satisfy the CWA).



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